SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 977

BARRY WYNN, CHARLES McCRAY, EVERETT LEROI JONES, JOHN WILLIAM SMITH, GEORGE JOHNSON, ALEXANDER HOLLOWAY, ELBERT ODOM, WALTER ROGER SPELLER, WOODROW A. HOWARD, CHARLES NATHANIEL VAN DER VEER, CHARLES TOOMER, REVEREND HORACE SHARPER, REVEREND JAMES W. PARROTT,

Appellants,

—against—

JOSEPH P. LORDI, as Prosecutor for the County of Essex, State of New Jersey,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ANSWER TO MOTION TO DISMISS

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JOSEPH P. LORDI, as Prosecutor for the County of Essex, State of New Jersey,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ANSWER TO MOTION TO DISMISS

POINT I

The District Court's abstention from determining claims of wholesale denial of federal constitutional rights in state criminal proceedings was improper.

Appellee seeks to justify the District Court's abstention as "proper" on the grounds that (1) appellants have available state court remedies for the vindication of their federal claims (Motion to Dismiss p. 6); (2) that "there was

no substantial showing that the federal tribunal was critical to the preservation of justice on constitutional rights" (*Id.* p. 8); and (3) that "no appellant has completed a state appeal at this time" (*Id.* p. 6) and that "[t]here is no issue involved in any of the criminal prosecutions in New Jersey that cannot be appropriately preserved for consideration on appeal". Significantly none of these reasons are supported by case citation to the decisions of this Court. Indeed they fly squarely in the face of the recent decisions of this Court, concerning the proper duty and function of a federal court in adjudicating federal claims. They reflect if anything, the decisions of this Court in the area of federal removal or federal habeas corpus—and not those of abstention in vindication of federal constitutional rights asserted under the Civil Rights Act.

It is clear that "relief under the Civil Right Act may not be defeated because relief was not first sought under state law which provided a remedy." *McNeese* v. *Board of Education*, 373 U. S. 668, 671 (1963); *Damico* v. *California*, 88 S. Ct. 526 (1967) (*per curiam*).

Indeed, as this Court said in *McNeese*:

> "We would defeat those purposes [of the Civil Rights Act] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court" 373 U. S. at 672.

As explained in *Zwickler* v. *Koota*, 88 S. Ct. 391 (1967), determination of the federal claim is the rule and abstention the rare exception: "The judge-made doctrine of abstention . . . sanctions such escape [from the determination of federal claims] only in narrowly limited 'special circumstances'." *Id.* at 395.

There is no reason to await the termination of state court proceedings as the District Court ordered. In the language of *McNeese*, there is:

> "in the present case no underlying issue of state law controlling this litigation. The right[s] alleged [are] as plainly federal in origin and nature as those vindicated in *Brown* v. *Board of Education* . . . nor [are] the federal right[s] in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *McNeese* v. *Board of Education*, 373 U. S. 668, 674 (1963).

The availability or exhaustion of state remedies does not provide the "special circumstances" required to justify abstention.

Appellees' suggestion that a "substantial showing" must be made that the action of a federal court "was critical to the preservation of justice or constitutional rights" (Motion to Dismiss p. 8) in order to establish a right to federal relief is unfounded after *Zwickler*, where this Court said "questions of abstention and of injunctive relief are not the same". 88 S. Ct. at 399. At this point in the case it is the duty of the District Court to determine whether plaintiff's can demonstrate the necessary injury to federal rights to justify equitable relief. The Court cannot shun that responsibility by deciding to abstain from determining the federal claims.

POINT II

Since the three judge court was properly convened to determine the constitutionality of a state statute appellants have a valid jurisdictional basis for appeal to this Court pursuant to 28 U. S. C. §1253.

A. *Appellants Have Standing to Challenge the Juror's Oath.*

Appellee contends that appellants lack standing to challenge the juror's oath, claiming that jurors alone have standing to challenge it (Motion to Dismiss p. 7). Appellee misreads our position.

Appellants do not base their claim on the rights of jurors or prospective jurors. Rather, they complain that the oaths have denied their personal rights: (1) by excluding from grand and petit jury service those persons who are members, or who fear they may be members, of the organizations proscribed by the oath, (2) by denying plaintiffs the right to be indicted and tried in accordance with the law of land, and (3) by prejudicing jurors through the inflammatory, unconstitutional language of the oath (Appellants' Appendix p. 8a).

It is well established that juries must be selected without the systematic exclusion of any group, whether it be economic, social, religious, racial, political or geographic. *E.g., Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946). It is also clear defendants in a criminal case have, "the right to be tried under what has been determined to be the law of the land." *State* v. *Madison*, 240 Md. 265, 213 A. 2d 880 (1965). (See Jurisdictional Statement Footnote,

p. 30.) Appellants have as much standing to challenge this oath as they would have to challenge a statute requiring the exclusion of Negroes from the juries.

Appellee's reliance on *Tileston* v. *Ullman*, 318 U. S. 44 (1943) is misplaced (Motion to Dismiss p. 7). In that case a physician prayed for a declaratory judgment as to whether statutes prohibiting the dissemination of birth control information were unconstitutional. The plaintiff asserted the constitutional rights of his patients who were not parties to the action, but did not, in contrast to appellants in the instant case, assert that he had been denied any rights. It is submitted that even if appellants herein predicated their claim on the juror's rights, that appellants having been directly prejudiced by the oath and subjected to criminal indictments and prosecution, have standing to challenge it. *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *NAACP* v. *Alabama*, 357 U. S. 449 (1958).

B. *Appellants' Attack on the Juror's Oath Is Within the Language of 28 U. S. C. §2281.*

Appellee contends that "appellants are not the subject of any enforcement attempt pertaining to N. J. S. A. 2A:73-3" and therefore cannot sue to enjoin its "enforcement or execution" pursuant to 28 U. S. C. §2281 (Motion to Dismiss p. 4).

28 U. S. C. §2281 provides for a three judge district court where a party seeks:

> "An interlocutory or permanent injunction restraining the *enforcement, operation* or *execution* of any State statute restraining the action of an officer of such

state in the enforcement or execution of such statute . . . " (emphasis supplied).

As noted in Section A, *supra,* it is clear that the oaths involved have been executed and presently *operate* to deny plaintiffs their constitutional rights. Appellee's contention that appellants are not the subject of any "enforcement attempt" pertaining to the oath, ignores the language of §2281 which permits injunctions to restrain the "operation or execution" of any State statute.

Moreover, said oath is being enforced against appellants, in that appellee is proceeding upon indictments issued from grand juries rendered constitutionally infirm by the grand jury oath, to trial before petit juries also rendered infirm by the petit jury oath. The application of the oath to deny appellants' rights is an enforcement of the oath against them.

Appellee also argues that he is not charged with the obligation of enforcing the oath statute (Motion to Dismiss p. 4). However, by prosecuting indictments returned pursuant to the oath, he is the state officer, unlike the Attorney General in *Moody* v. *Flowers,* 387 U. S. 97, 102 (1967), whose action is the effective means of the enforcement or execution of the challenged statute.

Moreover, appellee is the only state official against whom plaintiffs could obtain the appropriate relief on voiding the indictments.

Appellants could not restrain the State Court which administered the oath to the grand juries because the oaths were administered in June, 1967, and the issue as to the administration of the oaths is therefore moot. The only

way to repair the harm done at that time is now to enjoin the prosecutor from proceeding to compound the injury. Unlike in *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 581 (1939) appellee's presence is necessary to prevent the operation of the challenged statute.

By enjoining prosecution by appellee this Court would enjoin the operation of the oath. It is the clear intent of Congress as set forth in 28 U. S. C. §2281 that said action could not be taken by a single federal judge.

POINT III

No facts exist that justify dismissal for mootness.

Appellee contends that the appeal is "substantially moot" because only two of the thirteen appellants await trial (Motion to Dismiss p. 5). If for no other reason the fact two of the appellants await trial removes any doubt that the appeal presents a live case or controversy for this Court to consider and decide. The appeal is either moot or it is alive. There is no judicial doctrine of "substantial" mootness and indeed, appellee cites no authority to support this ingenious and novel contention.

In addition appellants sue as representatives of a class consisting of Negro citizens arrested on July 12-16 in the City of Newark who face criminal prosecutions in the State courts (Jurisdictional Statement, Appendix p. 3a). Appellants have been advised by the Clerk of the Essex County Courts that as of February 9, 1968 approximately two hundred members of said class are awaiting prosecution by appellee.

Although it is arguable that a case is moot after a party serves his sentence, there is no doubt that a controversy

exists so long as there remains a sentence to be served. See, *e.g.*, *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943); *Jacobs* v. *United States*, 388 U. S. 431 (1967); *cf. United States* v. *Morgan*, 346 U. S. 502, 512-13 (1954); *Jones* v. *Cunningham*, 371 U. S. 236 (1963). Indeed appellee contends in seeking to justify the District Court's abstention, that the State criminal cases are very much alive and wending their way through the State courts (Motion to Dismiss pp. 6, 10).

The considerations underlying a proper determination of abstention and a proper determination of mootness are very different, and it is respectfully submitted, if cases are alive for the determination of abstention, then certainly they cannot be considered dead for mootness purposes.

Appellee in contending the instant case is "substantially moot", argues that injunctive relief "would be inappropriate" because state criminal appeals have not been completed (Motion to Dismiss pp. 5-6). Considerations of the appropriateness of abstention have nothing to do with supporting a claim of mootness. Considerations such as comity are distinct from the determination as to whether effective equity relief can be rendered. See, *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963); *Zwickler* v. *Koota*, 88 S. Ct. 391 (1967); *Damico* v. *California*, 88 S. Ct. 526 (1967).

The claim of mootness is invalid so long as there is subject matter upon which the judgment of this Court, or the subsequent judgment of the court below can effectually operate. *Brownlow* v. *Schwartz*, 261 U. S. 216, 217 (1923); *Richardson* v. *McChesney*, 218 U. S. 487, 492 (1910). The pendency of State appellate proceedings as well as the

pendency of approximately two hundred trials provides the subject matter upon which a judgment can effectively be rendered.*

CONCLUSION

For the reasons submitted herein and in the Jurisdictional Statement appellants pray that this Court take jurisdiction of this appeal.

Respectfully submitted,

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* The consequences of ruling that a federal case may become moot because the trial stage of state criminal proceedings has been completed are dangerously far-reaching. If this Court should hold that the federal anti-injunction statute, 28 U. S. C. § 2283, is not a bar to relief under 42 U. S. C. § 1983, see, *Cameron* v. *Johnson*, 262 F. Supp. 873 (S. D. Miss. 1966), *prob. juris. noted*, 389 U. S. 809 (1967), and appellee herein wins a dismissal on the basis of mootness, then in effect the states will be able to foreclose access to the federal courts simply by mechanically expediting their trial procedures.

PER CURIAM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

WYNN ET AL. *v.* BYRNE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 977. Decided March 4, 1968.

PER CURIAM.

The judgment of the United States District Court for the District of New Jersey is vacated and the cause is remanded to that court for further proceedings. *Moody* v. *Flowers*, 387 U. S. 97, at 104.

MR. JUSTICE BLACK would affirm the judgment.